Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1997

DAWN DEE BRYANT, et al., *Petitioners*,

vs.

GENERAL DYNAMICS CORPORATION,
Respondent.

On Petition for Writ of Certiorari To The
United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ARTHUR J. BRENDER, JR.
LAW OFFICES OF ART BRENDER
600 Eighth Avenue
Fort Worth, Texas 76104
(817) 334-0171, telephone
(817) 334-0274, telecopier
Attorney for Petitioners
Counsel of Record

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73 pp

QUESTIONS PRESENTED

1. Whether the District Court's decision to deny Petitioners an opportunity to conduct adequate discovery prior to entering summary judgment for Respondent pursuant to a Fed. R. Civ. P. 56(f) request:
   a. constitutes a violation of Petitioners' due process rights and right to a jury trial under the Fifth and Seventh Amendments to the United States Constitution;
   b. constitutes a clear abuse of discretion by the District Court;
   c. violates the rule set forth by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby*, 447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2. Is the proper test to determine the application of the "unforeseen business circumstance" exception set out in § 2102(b)(2)(A) of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 whether the employer's conduct and judgment reasonably requires notice of a

contract cancellation or whether the mere probability of the cancellation is sufficient regardless of fault on the part of the employer.

LIST OF ALL PARTIES TO THE PROCEEDING IN COURT BELOW

This action was initiated by John Halkias, now deceased, together with Dawn Dee Bryant, Barry Jackson, Barbara McGrath, Samuel D. Carlson, Charles McQuistion, Richard Wolf, Jonathan S. Grant, Roberta Sanchez, Sheila Adams, Robert Ellison and Mark Bober, as Plaintiffs, both individually and seeking certification as a class action on behalf of all employees of General Dynamics Corporation who were similarly situated.

On May 3, 1993, the District Court certified this action as a class action, naming John Halkias and Barry Jackson, as class representatives of a class of over 2,000 non-union employees of General Dynamics Corporation who were employed at either the Fort Worth, Texas or Tulsa, Oklahoma plants of General Dynamics Corporation and whose employment was involuntarily terminated between the dates of January 7, 1991 and March 1, 1991 and who did not receive written notice of his or her termination of employment at least sixty (60) days prior to such termination.

During the time this case was on initial submission to the Fifth Circuit Court of Appeals, John Halkias died and on September 18, 1995, upon remand, the Court substituted Billye Halkias, the

widow of John Halkias, as the representative of the Estate of John Halkias. The Court then named Dawn Dee Bryant as class representative in the place of John Halkias.

Prior to the District Court's initial decision in this matter, James Anthony Cureington, acting pro se, had filed suit in a justice court in Tarrant County, Texas, alleging a violation of the WARN Act similar to that of the Plaintiffs and class representatives. His case was removed to the District Court and he was joined, both as an individual Plaintiff and class member in this case.

General Dynamics Corporation is the only Defendant in this case and is properly designated in the present caption.

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In The Supreme Court of the United States
October Term, 1997

DAWN DEE BRYANT, et al., Petitioners,

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GENERAL DYNAMICS CORPORATION,
Respondent.

Petition for A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

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The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 137 F.3d 333 which is reprinted in Appendix A hereto ("App. A") at page A28. The opinion of the District Court is reported at 955 F.Supp. 695. (App. A., A1)

JURISDICTION

The Court of Appeals entered its judgment on April 1, 1998. (App. A, A28) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, REGULATORY & RULE PROVISIONS INVOLVED

Fed. R. Civ. P. 56(f) states as follows:

> WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing a motion, that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or to make such order as is just.

The Fifth Amendment to the United States Constitution states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Sec. 2102(a) of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 states that "an employer shall not order a plant

closing or mass layoff until the end of a sixty (60) day period after the employer serves written notice of such an order . . ." on specifically identified persons and entities.

Sec. 2102(b)(2)(A) of the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 states that "an employer may order a plant closing or mass layoff before the conclusion of the sixty (60) day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required."

20 C.F.R. § 639.9(b)(1) states:

> An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden or unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A

government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

20 C.F.R. § 639.9(b)(2) states:

The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

STATEMENT

Petitioners Dawn Dee Bryant and Barry Jackson are class representatives of a class of over 2,000 persons comprised of non-union/salaried employees holding various positions of employment at General Dynamics Corporation plants in Fort Worth, Texas and Tulsa, Oklahoma. All were laid off in January and February of 1991 without being

provided the sixty (60) day notice required by the Worker Adjustment and Retraining Notification Act (WARN) 29 U.S.C. § 2101, *et seq.* Some, but not all of the Petitioners and members of the Class were employed in the development of the Navy high tech jet aircraft known as the A-12. The A-12 contract was awarded to General Dynamics and McDonnell Douglas Corporation jointly in January of 1988 and provided for the development of a medium range attack aircraft utilizing sophisticated technology. The contract reflected public concerns about cost overruns on defense contracts and called for a fixed ceiling price on each aircraft above which the contractor would absorb any and all costs. By early 1990, the two contractors, including the Respondent, were experiencing considerable difficulties with the A-12 contract such that they were unable to complete the contract on time or within its budget. On June 13, 1990, Stanley Pace, Chief Executive Officer, and Chairman of the Board of Directors of General Dynamics Corporation and John McDonnell, Chief Executive Officer of McDonnell Douglas Corporation, informed the Department of the Navy officials responsible for the contract that full scale development costs of the aircraft would overrun the contract ceiling price by an amount that the contractors could not and would not absorb. Two weeks later, on June 27, 1990 both Chief Executives delivered a letter to the Secretary of the Navy, Lawrence Garrett, reiterating their

claim that the cost of completion of the A-12 project would exceed the ceiling price set in the contract by an amount that would be unacceptable to the contractors. On July 12, 1990, the Navy notified both contractors that they had failed to deliver the first aircraft as required by the contract and informed them that the entire A-12 contract was in jeopardy. Thereafter followed a series of contacts between the Government and their contractors in which the contractors sought renegotiation of the contract both in timing and in price. While the Navy agreed to a revision in the production schedule, it remained steadfast in its refusal to renegotiate the contract price. In June, and, again in August, 1990, Chairman Stanley Pace discussed with his Board of Directors the A-12 project and the prospect of termination of the project because of cost overruns similar to what had occurred on the Lockheed P-7A aircraft. The General Dynamics' corporate minutes state:

> Because of its potential instructive relevance to the company's A-12 program circumstances, Mr. Pace reviewed the current experience of the Lockheed Corporation with its P7-A Maritime Patrol Aircraft contract with the Navy. The Lockheed contract was recently terminated for default. Mr. Pace commented upon the actions

> proposed by Lockheed and the response of the Navy in regard to Lockheed's financial problems and performance on the contract. The overall response of the Department of Navy was not helpful to Lockheed's financial problems and could be indicative of the response the Navy may take on other programs with similar difficulty.

By the fall of 1990 the A-12 project was 22 months behind schedule and had incurred huge cost overruns. On December 7, 1990 the Navy scheduled a final review regarding the continuation of the A-12 project by the Defense Acquisition Board. Following that review, on December 14, 1990, the Secretary of Defense, Richard Cheney, directed the Department of the Navy to "show cause" by January 4, 1991 as to why the A-12 contract should not be terminated. When General Dynamics Corporation and its partner failed to satisfy the Secretary of Defense's concerns about the contract, the A-12 contract was canceled for default on January 7, 1991. There followed the next day and for the next two months a layoff of approximately 2,000 non-union/salaried employees at the Fort Worth and Tulsa facilities as well as over 1,000 union employees.

Petitioners filed suit in federal district court

for the Northern District of Texas on November 24, 1992 alleging Respondent's failure to provide sixty (60) day notice of the mass layoff as required by § 2102(a) of the WARN Act.[1] On May 3, 1993, this matter was certified by the District Court as a Class action with the Class defined as follows:

> Each person (i) who has been an employee of General Dynamics Corporation (ii) who, at the time of the termination of his or her employment for General Dynamics Corporation, was not represented by a union, (iii) who, at that time was employed at either the Fort Worth, Texas, plant or the Tulsa, Oklahoma, plant of General Dynamics Corporation, (iv) whose employment was involuntarily terminated between the dates January 7, 1991, and March 1, 1991, and (v) who did not receive written notice of his or her termination of employment at least sixty (60) days prior to such termination.

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1 Prior to initiating suit in the Northern District of Texas, Petitioners filed a Motion to Intervene in *Int'l Association of Machinists and Aerospace Workers, AFL-CIO, et al. v. General Dynamics Corporation*, 821 F.Supp. 1306 (E.D. Mo. 1993). (*Machinists*) This motion was vigorously opposed by Respondent, and the Court denied Petitioners' attempt to intervene.

On June 24, 1993, the Court granted Respondent's Motion to Dismiss pursuant to Rule 12(c) Fed. R. Civ. P. holding that the six month statute of limitations under the National Labor Relations Act (NLRA) 29 U.S.C. § 160(b) precluded the Petitioners from proceeding and entered judgment. The Fifth Circuit affirmed in *Halkias v. General Dynamics Corporation*, 31 F.3d 224 (5th Cir. 1994) on August 24, 1994. On September 22, 1994, the Fifth Circuit, *sua sponte,* vacated its decision and granted rehearing *en banc*. Proceedings were stayed after the U.S. Supreme Court granted certiorari in *North Star Steel Company v. Thomas*, 130 L.Ed.2d 622 (1995). The Fifth Circuit on July 11, 1995 reversed and remanded this case to the District Court, 56 F.3d 27 (5th Cir. 1995) following the Supreme Court's decision in *North Star Steel v. Thomas*, ____ U.S. ____, 115 S.Ct. 1927, 132 L.Ed.2d 27 (1995) where this Court, in an unanimous opinion by Justice Souter, held that state law rather than federal law provides the proper source for a limitations period for civil actions to enforce WARN and that such actions did not fall within an exception to the general rule.

Upon remand, the District Court substituted Billie Halkias, the widow of Plaintiff John Halkias, on September 18, 1995 as Plaintiff in the *Halkias* case. Petitioner Dawn Dee Bryant was substituted as Class Representative. On October 3, 1995, after

additional briefing, the United States District Court for the Northern District of Texas, denied Respondent's Motion for Judgment on the Pleadings holding that the most analogous state law source for a limitations period under WARN is the "four-year limitations period for institution of actions for debt found at Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3) (Vernon 1986)." The District Court rejected the Respondent's claim that the Texas "payment of wages" statute and its six month limitations period was analogous to the WARN Act. Recognizing a conflict with the decision in *Staudt v. Glastron*, concerning the six (6) month limitations of "payment of wages" statute, on October 6, 1995 the District Court stayed the proceedings and granted Respondent the right for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Respondent appealed the trial court's denial to the Fifth Circuit Court of Appeals on October 16, 1995. On October 22, 1996, the Fifth Circuit affirmed the District Court's decision denying Respondent's Motion for Judgment on the statute of limitations defense and remanded this action to the District Court. Following a joint submission on scheduling, the first Joint Status Report in this cause was not filed until December 10, 1996. Only a few weeks later, on January 17, 1997, Respondent filed its Motion for Summary Judgment based on the affirmative defense of "unforeseen business circumstances" alleging that the sixty (60) day notice of the mass layoff was not

necessary because of business circumstances which were not reasonably foreseeable pursuant to § 2102(b)(2)(A) of the WARN Act. Petitioners filed a request for additional time to conduct discovery pursuant to Fed. R. Civ. P. 56(f). Petitioners also filed a response to Respondent's Motion for Summary Judgment based on the evidence available, without the benefit of discovery. The District Court denied Petitioners' request for a continuance and granted the summary judgment on March 5, 1997. (App. A, A1) Petitioners filed a Notice of Appeal on March 26, 1997. Petitioners appealed to the Fifth Circuit Court of Appeals which affirmed the District Court's decision on April 1, 1998. (App. A, A28)

REASONS FOR GRANTING THE PETITION

I. The District Court's decision, which was effectively affirmed and sanctioned by the Fifth Circuit, denying Petitioners any opportunity to conduct discovery relating to Respondent's allegation of "unforeseen business circumstances" prior to entering summary judgment in favor of the Respondent, constitutes a decision so far departed from the accepted and usual course of judicial proceedings that this Court's exercise of supervisory powers is required. The decision deprives Petitioners of their rights to due process of law and to a jury trial

as guaranteed by the Fifth and Seventh Amendments to the United States Constitution, constitutes a clear abuse of discretion and squarely conflicts with this Court's holdings in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby*, 447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

II. The Fifth Circuit Court of Appeals' decision concluding that business circumstances which are "not reasonably foreseeable" under § 2102(b)(2)(A) means those business circumstances which are "not probable" creates a conflict with the decisional law of the Fourth, Seventh, and Eighth Circuit Courts of Appeal which will result in an inconsistent and unjust application of the affirmative defense.

III. The Fifth Circuit Court of Appeals' decision concluding that business circumstances which are "not reasonably foreseeable" under § 2102(b)(2)(A) means those business circumstances which are "not probable" improperly modifies the plain meaning of the statute, and further, shifts the burden of proof to the Petitioners to prove that the business circumstances at issue were "not probable."

IV. The issues raised are important issues in that the statute affects large numbers of workers, including 2,000 members of this class, and mass layoffs are a continuing trend to which the WARN Act applies.

I. **The District Court's decision, which was effectively affirmed and sanctioned by the Fifth Circuit, denying Petitioners any opportunity to conduct discovery relating to Respondent's allegation of "unforeseen business circumstances" prior to entering summary judgment in favor of the Respondent, constitutes a decision so far departed from the accepted and usual course of judicial proceedings that this Court's exercise of supervisory powers is required. The decision deprives Petitioners of their rights to due process of law and to a jury trial as guaranteed by the Fifth and Seventh Amendments to the United States Constitution, constitutes a clear abuse of discretion and squarely conflicts with this Court's holdings in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby*, 447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).**

In 1986, this Court issued two opinions regarding the standards of proof in summary judgment actions brought pursuant to Fed. R. Civ. P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby*, 447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Although this Court indicated that summary judgment was not a disfavored procedure in federal practice, the decisions clearly state that summary judgment is proper only after the non-movant has been provided an opportunity to conduct discovery. "The non-movant must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the movant as long *as the non-movant has had a full opportunity to conduct discovery*." *Anderson, id.* at 477 U.S. 257. [emphasis added.]

In the present case, Petitioners enjoyed absolutely no opportunity to conduct discovery on the merits of Respondent's alleged affirmative defense of "unforeseen business circumstances." As set forth in the description of the proceedings below, this case travelled between the District Court and the Fifth Circuit Court of Appeals on the issue of statute of limitations for three and one-half years prior to the entry of summary judgment upon which

this request for Petition for Writ of Certiorari is based. It was not until October 22, 1996 that the final appeal on the statute of limitations issue was concluded when the Fifth Circuit affirmed the District Court's denial of Respondent's motion for judgment on the pleadings.

Afterwards, informal discussion occurred between counsel for the parties regarding the production of documents and depositions. Discovery had been discontinued while the case was appealed on two occasions relating to the statute of limitations issue. Although Respondent produced thirteen thousand (13,000) pages of unindexed documents to Petitioners in December, 1996, these documents were exhibits utilized by the parties in *Int'l Machinists and Aerospace Workers v. General Dynamics Corp.*, 821 F.Supp. 1306 (E.D. Mo. 1993), which the Petitioners had been prohibited from examining by protective order. Depositions could not be scheduled immediately due to the unavailability of the Respondent's witness, William Schlegel, and Respondent filed its motion for summary judgment based on the "unforeseen business circumstances" defense on January 17, 1997. Petitioners filed a request for continuance pursuant to Fed. R. Civ. 56(f), but the District Court denied same in its Memoranda Opinion dated March 27, 1997. (App. A, A22) Petitioners' Fed. R. Civ. P. 56(f) affidavit sufficiently stated the identity

of the witnesses who Petitioners intended to depose, the subject matter on which each would testify, and why the testimony was necessary. Specifically, Petitioners stated that a deposition of William Schlegel was needed to question him regarding information possessed by the Respondent prior to the mass layoff, and procedures followed (and the reasons for such procedures) to accomplish the mass layoff. Schlegel's affidavit was submitted by Respondent to establish that the A-12 contract cancellation was not reasonably foreseeable sixty (60) days prior to the layoff. Thus, Petitioners were denied an opportunity to take the deposition of the Respondent's primary witness in support of its affirmative defense. Petitioners also stated their intention to depose former Secretary of Defense Richard Cheney, whose approval of the A-12 contract was relied upon by the Respondent in determining that the contract would remain in full force and effect. Cheney's alleged support of the A-12 contract was one of the primary reasons relied upon by the Fifth Circuit in reaching its decision that the A-12 cancellation was not a "foreseeable probability." (App.A, A48) Thus, Cheney's involvement in the contract negotiations and communications with the Respondent were critical pieces of information which were denied the Petitioners. Petitioners were also denied an opportunity to obtain adequate and complete responses to their written discovery served on the

Respondent. In 1992, along with their Complaint, Petitioners timely served interrogatories and requests for production on the Respondent, however, the majority of the questions and requests were objected to, and Petitioners were not afforded a reasonable opportunity to compel the Respondent's answers. (Local Rules of the Northern District of Texas allowed a defendant to refuse to answer discovery on the merits in a class action until the class had been certified. Respondent objected and never responded to questions on the merits.)

The question of "reasonable foreseeability" is a question of fact, and the Petitioners were denied their right to collect, develop and present evidence to the Court. Significantly, two other courts have heard cases based on WARN Act violations after the A-12 contract cancellation, and, in each case, summary judgment motions were filed by the Respondent alleging "unforeseen business circumstances," but both were denied by the trial courts. *Loehrer v. McDonnell Douglas, 98 F.3d 1056 (8th Cir. 1996).* (Opinion on appeal after trial; District Court opinion denying summary judgment is unreported, CA-91-747-C(2) (E.D. Mo.)); *Machinists, supra*, (District Court opinion after trial; order and opinion denying summary judgment was not reported, CA-91-0125-C-7 (E.D. Mo.)). The plaintiffs in *Machinists, supra* and *Loehrer, supra*, were afforded a full trial on the merits. Certainly,

Petitioners herein are entitled to the same due process afforded the plaintiffs in these cases. The Fifth Circuit's affirmation of the District Court's denial of Petitioners' Rule 56(f) request for additional time to conduct discovery is clearly erroneous under *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); and *Anderson v. Liberty Lobby,* 447 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and requires reversal so that the Petitioners and the class of two thousand (2,000) workers may receive due process before their case is dismissed.

II. The Fifth Circuit Court of Appeals' decision concluding that business circumstances which are "not reasonably foreseeable" under § 2102(b)(2)(A) means those business circumstances which are "not probable" creates a conflict with the decisional law of the Fourth, Seventh, and Eighth Circuit Courts of Appeal which will result in an inconsistent and unjust application of the affirmative defense.

The Fifth Circuit's interpretation of "reasonably foreseeable" set forth in § 2102(b)(2)(A) of the WARN Act, as meaning "the probability of occurrence" of the business circumstances creates a conflict between the Fifth Circuit and the Courts of Appeal for the Fourth, Seventh and Eighth Circuits

regarding the standard of proof required to invoke the affirmative defense. Sec. 2102(a)(1) of the WARN Act prohibits a plant closing or mass layoff until sixty (60) days have elapsed after notice to each representative of the affected employees at the time of notice or if there is no such representative at that time, then to each affected employee.

Sec. 2102(b)(2)(A) of WARN Act further provides that, "[A]n employer may order a plant closing or mass layoff before the conclusion of the sixty (60) day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required. . . ."

In determining the applicability of the "unforeseen business circumstances" defense to Petitioners' claim, the Fifth Circuit concluded that the WARN Act envisioned the "probability of an unforeseen business circumstance" instead of a mere possibility of such a circumstance. The Court stated, "[W]e can only conclude that it is the probability of occurrence that makes a business circumstance 'reasonably foreseeable' and thereby forecloses use of the § 2102(b)(2)(A) exception to the notice requirement." (App. A, A42)

In the short history of the WARN Act, several courts of appeal have considered the application of

the "unforeseen business circumstances" to the WARN Act's sixty (60) day notice requirement. *Jurcev v. Central Community Hospital*, 7 F.3d 618 (7th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 1830, 128 L.Ed.2d 459 (1994); *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996); *Teamster Nat'l Freight Industry Negotiating Committee v. Churchill Truck Lines, Inc.*, 935 F.Supp. 1021 (W.D. Mo. 1996), *affirmed*, 121 F.3d 447 (8th Cir. 1997)(*per curiam*); *Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639 (4th Cir. 1997); and *Burnsides v. MJ Optical, Inc.*, 128 F.3d 700 (8th Cir. 1997).[2]

A review of the decisions in these circuits vividly illustrate the Fifth Circuit's sharp departure from the statutory and regulatory standards established by the U.S. Congress and Department of Labor, respectively. These courts have determined the applicability of the exception by following the regulatory test which states that:

> The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must

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2 It should be noted that the appeals in *Loehrer, supra; Churchill, supra and Burnsides, supra*, were taken *after* a full trial on the merits and summary judgment was rendered in *Jurcev, supra, and Local Union 7107, supra,* only after extensive discovery was completed.

> exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. . .

20 C.F.R. 639.9(b)(1) and (2).

The Department of Labor, "Analysis of Final Rule and Comments" explains:

> An important indicator of a business circumstance that is <u>not</u> reasonably foreseeable is that the circumstance is caused by some sudden, dramatic and unexpected action or condition outside the employer's control . . .

54 Fed. Reg. 16,062-63 (1989).

Specifically, in *Clinchfield Coal Co., supra,* the Court, following the mandate of the statutory and regulatory language of WARN, sets forth the test as follows:

> . . . the inquiry in this case is whether, in Clinchfield's 'commercially reasonable business judgment,' its failure to obtain an acceptable contract with Dofasco was 'sudden and expected' enough to entitle it to give but one day

of notice to the miners.

124 F.3d at 643.

In *Jurcev, supra*, the Court reviewed the facts under the regulatory language which states that "an important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. 639.9(b)(1). The Court did not stray from the statutory or regulatory language. Its determination of "reasonably foreseeable" was based on whether the defendant "knew or had reason to know" of the event which caused the mass layoff. The Eighth Circuit Court of Appeals, in *Burnsides, supra*, also utilized the regulatory language to determine the foreseeability of business circumstances which caused a plant closing or mass layoff. The Court stated, "The test for reasonable foreseeability focuses on an employer's commercially reasonable business judgment." 128 F.3d at 705.

Thus, the standard is an objective one, and constitutes a question of fact. The Fifth Circuit ignored the statutory and regulatory language and interjected "probability" into the formula for determining the application of the "unforeseen business circumstances" affirmative defense, and

ignored the question of whether the employer caused or partially caused the default, thus focusing only on the result and not on the reasonableness of the employer's obligation to give notice. The test pronounced by the Fifth Circuit will result in an inconsistent application of the defense between circuits, and, thus, justice will be determined by geography rather than the facts of the case.

III. The Fifth Circuit Court of Appeals' decision concluding that business circumstances which are "not reasonably foreseeable" under § 2102(b)(2)(A) means those business circumstances which are "not probable" improperly modifies the plain meaning of the statute, and further, shifts the burden of proof to the Petitioners to prove that the business circumstances at issue were "not probable."

Not only does the Fifth Circuit decision conflict with those of other circuits, but the Court's interpretation of the affirmative defense in § 2102(b)(2)(A) of WARN Act is contrary to the plain meaning of the statute. The Court's "probability" standard alters the proof required to satisfy the "unforeseen business circumstance" defense and, in fact, shifts the burden of proof to the Petitioners by shifting the focus to the probability of the result and <u>not</u> the reasonableness of the

employer's conduct in light of the obligation to give notice required to allow employees to decide whether to risk staying and possibly looking for employment with thousands of others in the event the layoff occurs or accepting other opportunities. Certainly, an event which is "foreseeable" is not necessarily "probable" within the context of the statute. If circumstances could have been anticipated, they are foreseeable. *United Paperworkers v. Alden Corrugated Container*, 901 F.Supp. 426 (D. Mass. 1995). Had Congress intended to establish "the probability of business circumstances" as the standard for determining when the sixty (60) day notice requirement was excused, it would have used such language. Additionally, the Department of Labor did not adopt such a standard in setting forth the scope of the affirmative defense.

The Court's interpretation broadens an exception which, like the "faltering company" defense to the WARN Act, is to be "narrowly construed." *See, Carpenters District Council v. Dillards Department Store*, 15 F.3d 1275, 1282 (5th Cir. 1994). The proper test "focuses on an employer's business judgment . . ." 20 C.F.R. § 639.9(b)(2). No language exists in the regulation (or statute) establishing "probability of the occurrence" as the proper scope for determining the applicability of the exception.

Throughout its opinion, the Court describes

the evidence presented by the Petitioners relating to the foreseeability of the A-12 contract cancellation. The Court states, "[T]here is no doubt that the evidence showed General Dynamics' Board of Directors knew of the possibility of the contract cancellation and mass layoffs as early as June, 1990." (App. A, A45). The Court finds, however, that "the evidence in mitigation of the potential for contract cancellation precludes that possibility from becoming a probability." (App. A, A48) The Court concludes its discussion of the evidence by stating, ". . . even if the evidence presented a good faith dispute as to the possibility of contract cancellation, in the face of the Navy's and Secretary Cheney's continuing support, no rational jury could have concluded that the contract cancellation was a foreseeable probability until the last minute, i.e., December 14, 1990." (App. A, A48) (Note that no "warning" was given for seven days after the date selected by the Court.) Clearly, under the proper statutory and regulatory test, the Petitioners raised a genuine issue of material fact as to the foreseeability of the A-12 contract cancellation which were recognized by the Fifth Circuit. It is apparent from the Court's conclusion that "no rational jury could have concluded that the contract cancellation was a foreseeable probability" that the Court broadened the category of circumstances intended by Congress and has shifted the burden to the Petitioners to prove that the cancellation was a

"foreseeable probability" rather than require the Respondent to establish, as a matter of law, that the A-12 contract cancellation was not "reasonably foreseeable." The "unforeseen business circumstances" exception is an affirmative defense upon which a defendant bears the burden of proof at trial. *Loehrer, supra,* at 1060. The Fifth Circuit's interpretation is clearly erroneous and requires reversal by this Court.

IV. The issues raised are important issues in that the statute affects large numbers of workers, including 2,000 members of this class, and mass layoffs are a continuing trend to which the WARN Act applies.

The purpose underlying the WARN Act is to afford a measure of protection to workers, their families and communities by prohibiting certain employers from ordering a plant shut down or mass layoff in advance of a sixty (60) day notification to its employees and/or their representative. 20 C.F.R. § 639.1(a) (1994). By its own definitions, the WARN Act provisions apply only to large groups of workers. The notice requirements apply only to employers who employ: A) one hundred or more employees, excluding part-time employees; or B) one hundred or more employees who, in the aggregate work, at least four thousand (4,000) hours per work (exclusive of hours overtime). 29 U.S.C. §

2101(a)(1). A plant closing by definition ". . . means the permanent or temporary shut down of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shut down results in an employment loss at the single site of employment during any thirty (30) day period for fifty (50) or more employees excluding part-time employees." 29 U.S.C. § 2101(a)(2). A mass layoff occurs at a single site of employment during a thirty (30) day period when either thirty-three percent (33%) of the employees (a minimum of 50) or 500 employees are laid off. 29 U.S.C. § 2101(a)(3).

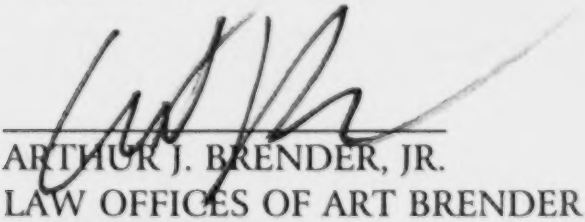
In 1993, Senator M. Metzembaum, the original sponsor of the WARN Act, testified before the Senate Labor and Human Resources Committee Hearing on the WARN Act. He acknowledged the persistent problem faced by America's workers when he stated, "[I]t seems like every time I open up the newspaper, I read about more layoffs at what were once thought of as America's most stable employers -- corporate giants like General Motors, IBM, Sears and Boeing." Daily L.A.B. Rep. (BNA), no. 35,AA-1 (Feb. 24, 1993). Senator Metzembaum cited a survey conducted by American Management Association which indicated that 25% of U.S. companies had suffered a reduction in force in the past few months, and more layoffs were feared as a result of the trade agreement with Mexico.

In light of the harm which befalls workers who do not have adequate time to secure new employment after a plant closing or mass layoff and the clear congressional intent to provide sixty (60) day notice under such circumstances, and the broad effect the statute has concerning the reductions in force occurring on a daily basis in our society, it is imperative that this Court grant certiorari on Petitioners' case to establish the proper test for the application of the "unforeseen business circumstances" under the WARN Act.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



ARTHUR J. BRENDER, JR.
LAW OFFICES OF ART BRENDER
600 Eighth Avenue
Fort Worth, Texas 76104
(817) 334-0171, telephone
(817) 334-0274, telecopier

ATTORNEY FOR PETITIONERS
COUNSEL OF RECORD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN HALKIAS, ET AL,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	NO. 4:92-CV-860-A
	§	(CONSOLIDATED
	§	WITH NO. 4:93-
	§	CV-042-A)
GENERAL DYNAMICS	§	
CORPORATION	§	
	§	
Defendant.	§	

MEMORANDUM OPINION
and
ORDER

Came on for consideration the motion of defendant, General Dynamics Corporation, for summary judgment. The court, having considered the motion, the response of plaintiffs, Dawn Dee Bryant, Barry Jackson, and others similarly situated, the record, the summary judgment evidence, and applicable authorities, finds that the motion should be granted. Defendant has demonstrated that there

is no genuine issue of material fact and that it is entitled to judgment as a matter of law that plaintiffs take nothing on their claims against defendant. Specifically, defendant has demonstrated that the mass layoff of plaintiffs was caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required. 29 U.S.C. § 2102(b)(2)(A). Further, defendant gave as much notice as was practicable. 29 U.S.C. § 2102(b)(3).

I.
Nature of the Case

On May 3, 1993, the court signed an order granting plaintiffs' motion for class certification and defining the class as:

> Each person (i) who has been an employee of General Dynamics Corporation, (ii) who, at the time of the termination of his or her employment for General Dynamics Corporation, was not represented by a union, (iii) who, at the time was employed at either the Fort Worth, Texas, plant or the Tulsa, Oklahoma, plant of General Dynamics Corporation, (iv) whose employment was

> involuntarily terminated between the dates January 7, 1991, and March 1, 1991, and (v) who did not receive written notice of his or her termination of employment at least sixty (60) days' prior to such termination.

Plaintiffs seek recovery under the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C. §§ 2101-09. They allege that defendant failed to provide them with 60 days' written notice as required by 29 U.S.C. § 2102 prior to the commencement of a mass layoff in January and February 1991.

II.
Motion for Summary Judgment

Defendant urges one ground in support of its motion for summary judgment--that cancellation of the A-12 program on January 7, 1991, was not reasonably foreseeable as of early November 1990. Therefore, as a matter of law, it complied with the notice requirements of WARN.

III.
Summary Judgment Principles

A party is entitled to summary judgment on

all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514. Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256, 106 S.Ct. at 2510, 2514. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the 'precise manner' in which that evidence support[s] [its] claim[s]." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment.

Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir.1984).

The standard far granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita*, 475 U.S. at 597, 106 S.Ct. at 1361-62.

IV.
Undisputed Summary Judgment Evidence

The facts listed by defendant in support of its motion are essentially undisputed.[1] Summary judgment evidence establishes: On January 13, 1988, the Department of the Navy awarded defendant and McDonnell Douglas Corporation a contract to develop a radically new generation of carrier-based, medium attack aircraft referred to as the A-12. By order dated December 14, 1990, the Secretary of Defense advised the Navy that the A-12 program was in "serious trouble" and directed the Navy "to show cause by January 4, 1991, why the Department should not terminate the A-12 program." Defendant

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1 Areas of disagreement are discussed in succeeding footnotes.

became aware of the notice late that day. By letter dated December 17, 1990, the Navy notified defendant that the government considered its performance on the A-12 program "unsatisfactory" and that unless specified conditions were cured by January 2, 1991, the government might terminate for default. In response, defendant issued, on December 20, a special bulletin to all employees, which provided:

> As you are aware, General Dynamics was recently notified that the A- 12 program is threatened with cancellation--possibly as early as 2 January 1991--because the customer considers us to be in default of the contract. We do not believe we are in default. We are discussing the situation with the Navy and the office of the Secretary of Defense to attempt to develop a mutually satisfactory basis for continuation of this vital national defense program.
>
> We have identified approximately 4,000 employees throughout the division who may be laid off if the program is canceled. These individuals will receive a letter

> tomorrow that serves as an early warning that they may lose their jobs. Please understand, the letters tomorrow will be warnings only. We don't know if the program will be canceled. I assure you that we are doing everything we can to resolve the difficulties and continue our work on the A-12. We will keep you informed of further developments.
>
> I sincerely regret, very much, that this is happening, especially in the holiday season, but want employees who may be affected to know the facts as early as possible.

The following day, defendant delivered notices to each potentially affected individual employee that read as follows:

> As you undoubtedly know, the Secretary of Defense on Friday, December 14, 1990, directed [that] an extensive review of the A-12 Program be conducted. The Secretary has ordered the United States Navy to show cause by January 4, 1991, why the Program should not be canceled. In this

context the United States Navy has notified General Dynamics that unless certain alleged deficiencies in its performance are cured by January 2, 1991, the A-12 contract might be canceled. A cancellation of the program would make 60-days notice of termination of employment infeasible. Such a cancellation would affect all employees at the Fort Worth Division. Therefore, you should be prepared for the potential of a permanent reduction in force and your termination anytime after January 2, 1991.

If you are a former hourly employee, you may have regression options.

We regret that we cannot be more definitive in what the future holds. We will, however, keep you advised as we learn more.

If you have any questions or require further information, please contact your supervisor or W.F. Schlegel, manager of salaried compensation, at (817) 777- 2670.

In order to issue the thousands of notices required, defendant's personnel worked long hours to identify which employees might actually be laid off in the event of cancellation of the A-12 program. In determining which employees might be laid off, defendant engaged in a comprehensive evaluation of the comparative performance histories of highly skilled employees throughout its organization.[2] As expressed in the notices, defendant hoped that the A-12 program would not be canceled. Defendant tended to believe that the program would not be canceled because the program had passed an October 18, 1990, critical design review and Navy officials enthusiastically expressed support for the program both before and after the show cause and cure notices.[3] Nevertheless, on January 7, 1991, the Secretary of Defense announced his decision to terminate the contract.

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[2] Plaintiffs dispute whether this procedure was necessary. They do not dispute that defendant engaged in the procedure.

[3] Plaintiffs object that statements by Navy officials regarding the A-12 program recited in the declaration of John Lamers are hearsay. As defendant notes, however, the statements are not offered for the truth of the matters asserted. Rather, the simple fact that the statements were made caused defendant reasonably to believe that the A-12 program would not be canceled .

V.

Requirements of WARN and Plaintiffs' Attempts to Raise an Issue for Trial

WARN requires a business that employs more than 100 workers to provide at least 60 days' written notice before a plant closing or mass layoff. 29 U.S.C. § 2102. Its purpose is to protect workers, their families and communities by providing notice so that workers who will be terminated may seek other jobs or retraining. *Halkias v. General Dynamics Corp.*, 31 F.3d 224, 233 (5th Cir.1994), vacated, 56 F.3d 27 (5th Cir.1995). An exception to the notice requirement exists where a layoff is "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A).

Plaintiffs cannot deny that their layoffs were caused by the decision of the Secretary Of Defense to cancel the A-12 program. The only issue is whether cancellation of the program could have been reasonably foreseen prior to mid- December 1990. In response to the motion for summary judgment, plaintiffs otter nothing but speculation that notice of the layoffs should have been given at an earlier date. They advocate, without any legal authority to support their position, that notice under WARN must be given whenever an employer has some vague

notion that something bad might happen. In so doing, they completely overlook the precise nature of the notice required to be given. See 20 C.F.R. § 639.7.

Plaintiffs seek to create a fact issue by relying on materials introduced at earlier trials in similar WARN cases. Collateral estopped however, is not as broad a doctrine as plaintiffs represent. *Parklane Hosiery Co. v. Shore* does not stand for the proposition that the court must give plaintiffs the benefit of selected evidentiary findings in a similar-type case while disregarding findings not favorable to them. 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

Parklane Hosiery does not suggest that plaintiffs can rely on testimony offered during other proceedings against defendant in support of their opposition to defendant's pending motion for summary judgment. Rule 56 refers to "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" as being proper summary judgment evidence. *Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir.1995). Nevertheless, even assuming that the court is required to accept as true the testimony of plaintiffs' expert in another case and that such testimony has been properly authenticated, the testimony f ails to

raise a genuine issue of material tact in this case. The testimony Of Dr. Lawrence Korb, quoted at pages 29 and 30 of plaintiffs' response, merely reflects that defendant knew, by October 1990, that if it did not pass the Defense Acquisition Board in December, the project would not go forward. The inference that defendant knew in October that the project would be canceled is so weak that it tails to raise a genuine issue for trial in light of the overwhelming evidence that the layoff was not reasonably foreseeable until mid-December 1990. Likewise, the [act that defendant's CEO, Stanley Pace, acknowledged that he knew of an earlier aircraft project cancellation would not lead a reasonable factfinder to conclude that defendant knew before mid-December 1990 that its project would be canceled.

Plaintiffs further argue, without any authority, that defendant should not have taken the time to determine which employees would be retained, but should have given notice to all employees of their potential termination. WARN requires, however, that notice be given only to "affected employees." 29 U.S.C. § 2102(a). "Affected employees" are those who may reasonably be expected to experience an employment loss as a consequence of a mass layoff. 29 U.S.C. § 2101(a)(5). Neither the statute nor regulations restrict an employer's discretion in

determining which employees will be affected. The summary judgment record establishes without genuine dispute that defendant gave as much notice as was practicable, and included in the notice a brief statement for reducing the notification period.

Plaintiffs argue that reasonable foreseeability cannot be determined by a motion for summary judgment.[4] Yet they do not offer any evidence to raise a genuine issue of material tact as to reasonable foreseeability. Instead, they argue that they "should be afforded an opportunity to collect, develop, and present their own evidence to the jury." Plaintiffs' Response at 27. Summary judgment is appropriate in cases where reasonability is in question. *See. e.g.*, *Stout v. Borg-Warner Corp.*, 933 F.2d 331 (5th Cir.), *cert. denied*, 502 U.S. 981, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991); *Oil Chemical & Atomic Workers Int'l. Union v. American Home Prod. Corp.*, 790 F.Supp. 1441, 1451-53 (N.D. Ind.1992). None of the

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[4] Plaintiffs note as significant the denial of motions for summary judgment in *Loehrer v. McDonnell Douglas Corp.*, No. 4-91 CV 01747, slip op. (E.D.Mo. Oct. 14, 1995), aff'd, 98 F.3d 1056 (8th Cir.1996), and *International Ass'n of Machinists v. General Dynamics Corp.*, 821 F.Supp. 1306 E.D.Mo.1993). The motion in Loehrer was not considered prior to trial, hut was simply carried with the case and denied after trial. The record does not reflect what materials were before the trial court in Machinists when defendant's motion for summary judgment was denied.

cases cited by plaintiffs concerns a summary judgment situation. *See, e.g., Western American., Inc. v. Aetna Casualty & Sur. Co.*, 915 F.2d 1181 (8th Cir.1990) (evidence did not justify jury verdict); *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir.1978) (federal law governs whether a party is entitled to a jury trial). But, the case most in point notes that if there is evidence of such quality and weight that reasonable minds might reach different conclusions, then a jury issue exists. *Lowe v. Pate Stevedoring Co.*, 558 F.2d 769, 772 (5th Cir.1977). Here, plaintiffs have not come forward with such evidence.

VI.
Request for Continuance

Plaintiffs seek a continuance so that they might "obtain critical and relevant depositions and other discovery necessary to adequately respond" to defendant's motion. Plaintiffs' Response to Defendant's Motion for Summary Judgment at 7.[5] Plaintiffs argue that they "simply have not been

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[5] Contrary to the requirements of Local Rule 2.1(d) & (e), plaintiffs' response does not reflect that it contains a separate motion for continuance. Nor is there a certificate of conference reflecting that plaintiffs' counsel conferred with counsel for defendant to determine whether such a motion would be opposed. See Local Rule 5.1(c).

afforded an opportunity to conduct the discovery required." Id. at 8-9. However, summary judgment may be granted at any time; and, there is no requirement that discovery take place before granting summary judgment.[6] *McCarty v. United States*, 929 F.2d 1085, 1088 (5th Cir. 1991); *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1285 (5th Cir. 1990). In any event, plaintiffs cannot simply rely on vague assertions that additional discovery will produce needed but unspecified facts. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S .Ct. 936, 117 L.Ed.2d 107 (1992). Instead, plaintiffs must specifically show how the requested discovery will defeat summary judgment and demonstrate that they have diligently pursued such discovery. Id. As the Fifth Circuit has noted, because the burden on one opposing summary judgment is not heavy, he must conclusively justify the need for more discovery. *Union City Barge Line.*

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6 Thus, there is no merit to plaintiffs' argument that they should be entitled to conduct discovery through the date set by the court's scheduling order for discovery cutoff before being required to respond to a motion for summary judgment. In any event, the deadline set by the scheduling order does not reflect the court's assessment of the minimum time needed for discovery. Rather, a deadline is necessary because some attorneys would otherwise doubtless be taking depositions the day before trial.

Inc. v. Union Carbide Corp., 823 F.2d 129, 137 (5th Cir.1987). Plaintiffs state, in their response and in the affidavit of Art Brander, attached as Exhibit 3 to the response, that they may need the depositions of former Secretary of Defense Richard Cheney and of William Schlegel. They do not specify, however, the facts they expect to prove by such depositions. Nor do they explain what they hope to glean from the voluminous documents produced in prior litigation of WARN claims.[7] In sum, they simply have not met their Rule 56(f) burden.

VII.
ORDER

The court ORDERS that defendant's motion for summary judgment be, and is hereby, granted; that plaintiffs take nothing on their claims against defendant; and that such claims be, and are hereby, dismissed with prejudice.

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

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7 Plaintiffs do not indicate when they plan to start their review of the documents or why they have not already undertaken such review.

The court ORDERS, ADJUDGES, and DECREES that plaintiffs take nothing on their claims against defendant, General Dynamics Corporation, and that such claims be, and are hereby, dismissed with prejudice. The court further ORDERS, ADJUDGES, and DECREES that defendant have and recover its court costs from plaintiffs, jointly and severally.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 97-10334

JOHN HALKIAS, ET AL.,
Plaintiffs

DAWN DEE BRYANT; BARRY JACKSON,
Plaintiffs-Appellants

VERSUS

GENERAL DYNAMICS CORPORATION,
Defendant-Appellee

JAMES ANTHONY CUREINGTON,
Plaintiff

VERSUS

GENERAL DYNAMICS CORPORATION,
Defendant

Appeal from the United States Court
For the Northern District of Texas

Before JOLLY, DUHE' and PARKER, Circuit Judges.
ROBERT M. PARKER, Circuit Judge:

I.

FACTS & PROCEDURAL HISTORY

On January 13, 1988, General Dynamics and McDonnell Douglas Corporation were awarded a contract by the United States Navy to jointly develop a new generation of carrier-based, medium attack aircraft to be known as the A-12 "Avenger". The contract contained several provisions reflecting a concern for the abusive cost overruns of the past. Costs between the target price of $4.4 billion and the ceiling price of $4.8 billion would be shared by the government and the contractors (60% by the government and 40% by the contractors). All costs over the ceiling price would be absorbed by the contractors.

By May, 1990, the A-12 contractors had incurred substantial unforeseen production difficulties and by its own estimate, General Dynamics concluded that the cost of completion

would be $700 million more than planned. On June 13, 1990, the contractors notified the Navy that the costs of completion would overrun the contract ceiling by an amount that the contractors could not absorb. Throughout the remainder of 1990 production continued amidst various attempts to restructure the contract, which did result in a new delivery schedule. However, the Navy would not agree to change the contract ceiling price. Meanwhile, the threat of a contract cancellation loomed overhead.

On December 14, 1990, the Secretary of Defense directed the Navy to show cause by January 4, 1991, why the A-12 contract should not be canceled. Later that same day, General Dynamics received informal notice of the Secretary's show cause order. On December 17, 1990, the Navy gave the contractors notice that their performance on the A-12 contract was "unsatisfactory" and that unless specified conditions were met by January 2, 1991, the contract might be terminated. On December 20, 1990, General Dynamics issued a special bulletin to all of its employees notifying them that the A-12 contract was in jeopardy and promising to provide notices the next day to each individual employee who might lose his or her job. As promised, on December 21, 1990, General Dynamic sent out individual notices to all potentially affected

employees, providing official but conditional notification that they might be terminated in the event that the A-12 contract were canceled. On January 7, 1991, Secretary Cheney announced his decision to terminate the A-12 contract effective immediately. As a result General Dynamics immediately began laying off affected employees. Approximately 2000 non-union salaried employees were laid off from General Dynamics' Fort Worth, Texas, and Tulsa, Oklahoma; facilities.

On November 24, 1992, Plaintiff John Halkias filed suit under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1988)(the "WARN" act), claiming that General Dynamics had failed to comply with the Act's sixty-day notice requirement. The district court certified a class of non-union salaried employees and designated John Halkias as class representative. On June 24, 1993, the district court granted General Dynamics' Fed. R. Civ. P. 12(c) motion to dismiss holding that the six-month statute of limitations of the National Labor Relations Act, 29 U.S.C. § 160(b), was applicable to actions under the WARN Act, and Plaintiff appealed to this Court. On July 11, 1995, this Court reversed the district court and remanded the case following *North Star Steel v. Thomas*, ___ U.S. ___, 115 S. Ct. 1927, 132 L. Ed. 2d 27 (1995), which held that state law rather than the

NLRA provided the relevant statute of limitations for actions under the WARN Act. *Halkias v. General Dynamics Corp.*, 56 F.3d 27 (5th Cir. 1995).[1]

On October 3, 1995, the district court determined that the Texas four-year statute of limitations for actions for debt, Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(3)(Vernon 1986), was the most analogous to actions under the WARN Act and denied General Dynamics' Rule 12(c) motion. Since this holding was at odds with a holding by the district court for the western district of Texas, the district court granted General Dynamics the right to take an interlocutory appeal on October 6, 1995, which invitation General Dynamics accepted. Over one year later, on October 22, 1996, following the decision in. *Staudt v. Glastron, Inc.*, 92 F.3d 312 (5th Cir. 1996), this Court affirmed the district court's ruling concerning the statute of limitations and remanded the case. *Halkias v. General Dynamics Corp.*, 101 F.3d 698 (5th Cir. 1996)(table).

On December 12, 1996, the district court issued a scheduling order establishing July 31, 1997,

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1 During the pendency of this appeal, Plaintiff John Halkias passed away, and on remand his widow, Billie Halkias, was substituted as Plaintiff and Appellant Dawn Dee Bryant was substituted as class representative.

as the deadline for completion of discovery. On January 16, 1997, General Dynamics filed its motion for summary judgment, arguing that sixty-day advance written notice was not required in this case, because the layoffs were "caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). In response Appellants sought to have General Dynamics' motion for summary judgment continued so that more discovery might be conducted in accordance with Fed. R. Civ. P. 56(f) . That motion was denied. The motion for summary judgment was fully briefed, and on March 5, 1997, the district court granted it. Plaintiffs-Appellants have taken this appeal raising the following issues:

1. Did the district court err by refusing to continue General Dynamics' motion for summary judgment so that additional discovery might be conducted in accordance with Fed. R. Civ. P. 56(f)?

2. Did the district court err by granting General Dynamics' motion for summary judgment?

II.
LAW & ANALYSIS

A.

The WARN Act

The WARN Act provides that:

"[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order ... to each representative of the affected employees as of the time of the notice, or if there is no such representative at that time, to each affected employee...."

29 U.S.C. § 2102 (a)(1). However, the Act further provides that;

"[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not *reasonably foreseeable* as of the time that notice would have been required ... An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period."

29 U.S.C. § 2102 (b)(2)(A) & (b)(3)(emphasis added). This case centers around the proof in support of and against the proposition that General Dynamics should have reasonably foreseen the

impending contract cancellation and therefore cannot avail itself of the exception in § 2102(b)(2)(A). This Court reviews a district court decision to grant summary judgment *de novo,* applying the same standard as the district court. *Wynn v. Washington National Insurance Company,* 122 F.3d 266, 268 (5th Cir. 1997), *citing Bodenheimer v. PPG Indus., Inc.,* 5 F.3d 955, 956 (5th Cir. 1993).

General Dynamics argues that the cancellation of the A-12 contract and the resultant layoffs did not become reasonably foreseeable until December 14 1990 at the earliest if at all, when General Dynamics learned through informal channels that Secretary Cheney had issued an order to the Navy requiring it to show cause why the A-12 program should not be terminated. General Dynamics argues that from December 14 until official notice was given to all affected employees on December 21, 1990, it acted with due diligence in an attempt to identify those employees who would be affected and to prepare the appropriate notices in compliance with § 2102 (b)(3). General Dynamics argues that it reasonably believed that the program would not be terminated, in spite of serious cost overruns and a projected production delay of 22 months, because both the Navy and Secretary Cheney still expressed very high support for the program.

Appellant argues that General Dynamics knew

or should have known that the A-12 contract would be canceled. As evidence that the cancellation was reasonably foreseeable, Appellant offered the testimony of its expert, Dr. Lawrence Korb, in another WARN Act case arising out of these layoffs, wherein Dr. Korb testified that General Dynamics knew as early as October, 1990, that if it did not pass the Defense Acquisition Board's review in December, 1990, the project would not go forward.[2] Appellant also offered various minutes from General Dynamics' board of directors meetings wherein the A-12 project and its possible termination were discussed. Appellant argued that those minutes showed that General Dynamics' CEO Stanley Pace was aware of the cancellation of a similar Lockheed aircraft project because of cost overruns and production delays.

Before we may review the evidence, some clarification of the precise question before this Court is in order. We must determine whether the evidence before the district court supported a finding, as a matter of law, that 60-days before the layoffs in this case General Dynamics could not reasonably have foreseen the cancellation of the A-12 contract which precipitated these layoffs. Yet, the

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2 The cited testimony of Korb was in *Int'l Assoc. Machinists & Aerospace Worker v. Gen. Dynamics Corp.*, 821 F.Supp. 1306 (E.D.Mo. 1993).

question of reasonable foreseeability begs another question: by adopting "reasonable foreseeability" as a standard, does the WARN Act envision the probability of an unforeseen business circumstance (i.e. the contract cancellation) or instead the mere possibility of such a circumstance? We can only conclude that it is the probability of occurrence that makes a business circumstance "reasonably foreseeable and thereby forecloses use of the § 2102(b)(2)(A) exception to the notice requirement. A lesser standard would be impracticable. Since cancellation is a possibility every time there is a cost overrun, defense contractors like General Dynamics would be put to the needless task of notifying employees of possible contract cancellation and concomitant lay-offs every time there is a cost overrun, and experience teaches us that there are invariably cost overruns, which most often do not lead to contract cancellation.

B.
The Evidence

Having reviewed the summary judgment evidence closely, we must conclude that the district court properly granted summary judgment. There is no doubt that the evidence showed General Dynamics' board of directors knew of the possibility of contract cancellation and mass lay-offs as early as

June, 1990. In particular, as early as June 6, 1990, minutes of the General Dynamics board of directors meeting indicate that the board was aware of the likelihood of a substantial cost overrun and production delay, that the Navy and Department of Defense were aware of these problems and that General Dynamics had begun negotiations with the Navy and Department of Defense to restructure the contract.

At the August 1, 1990, meeting of the board of directors, the Chairman of the board, Mr. Stanley Pace discussed with the board members the recent experience of the Lockheed corporation in its development of an aircraft for the Navy. It was reported by Mr. Pace that Lockheed had received insufficient assistance from the Navy when it experienced the same sort of problems that General Dynamics was experiencing with the A-12 program. Mr. Pace reported that the Lockheed contract was eventually canceled and that Lockheed's experience might be indicative of what General Dynamics could expect. On October 16, 1990, Mr. Pace again addressed the board of directors regarding the A-12 contract. He indicated that the program was due to be reviewed by the Defense Acquisition Board ("DAB") on December 7, 1990, and that the DAB would be considering all aspects of the program, including termination of the contract. Finally, on

November 7, 1990, Mr. Pace informed the board that, although recent congressional enactments did not cancel the remaining options under the A-12 contract, those bills did allow Secretary Cheney to take action to address the huge cost overruns and production delays in the program.

Therefore, by November 7, 1990, it is clear that three *possibilities* existed. Either the contract would be restructured, the contract would be canceled, or General Dynamics would simply default rather than absorb the cost overruns. The minutes of various board meetings would support a jury's conclusion that the board was aware of the *possibility* that the contract would be canceled. Nevertheless, the evidence in mitigation of the potential for contract cancellation, precludes that possibility from becoming a probability. As noted previously, the Navy and Secretary Cheney had expressed their continuing support for the A-12 program up to the last minute. Given that unwavering support, it seemed less than probable that the contract would be canceled. Therefore, even if the evidence presented a good faith dispute as to the possibility of contract cancellation, in the face of the Navy's and Secretary Cheney's continuing support, no rational jury could have concluded that contract cancellation was a foreseeable probability until the last minute, i.e., December 14, 1990.

III .
CONCLUSION

Having concluded that summary judgment was appropriate, we affirm. We do not reach the question of whether the district court erred by refusing to allow further discovery before ruling on General Dynamics motions for summary judgment. Appellants have not demonstrated to this Court that further discovery would lead to any evidence, which might raise the A-12 contract cancellation from a possibility to a probability any sooner than December 14, 1990.

AFFIRMED.

Supreme Court, U.S.
FILED
AUG 10 1998
OFFICE OF THE CLERK

No. 98-112

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DAWN DEE BRYANT, ET AL.,

Petitioners,

v.

GENERAL DYNAMICS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

WILLIAM J. KILBERG
(Counsel of Record)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

KARL G. NELSON
GIBSON, DUNN & CRUTCHER LLP
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
Telephone: (214) 698-3100
Facsimile: (214) 698-3400

Attorneys for Respondent
GENERAL DYNAMICS CORPORATION

QUESTIONS PRESENTED

1. Whether the District Court acted within the scope of its broad discretion when it denied Petitioners' request to delay ruling on summary judgment to allow additional time for discovery.

2. Whether the Court of Appeals correctly held, based on the record before it, that the Government's abrupt decision to cancell the Navy's A-12 program leading to the layoffs at issue in this case was not "reasonably foreseeable" within the meaning of the Worker Adjustment and Retraining Notification Act.

RULE 29.6 STATEMENT OF AFFILIATED CORPORATIONS

Respondent **General Dynamics Corporation** has neither a parent company nor any nonwholly owned subsidiary requiring identification pursuant to Rule 29.6 of the Rules of the Supreme Court.

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STATEMENT OF THE CASE

While the Worker Adjustment and Retraining Notification Act of 1988 ("WARN"), 29 U.S.C. §§ ~~2101-2109,~~ generally requires 60-days' notice to employees before a covered mass layoff, the statute provides an exception in the event of "business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Here, General Dynamics did not know, and could not have known, with any precision in November of 1990 whether the Government would cancel the Navy's A-12 program, much less that it would do so in January of 1991. *See* Petitioners' Appendix ("Pet. App.") at A29 ("no rational jury could have concluded that contract cancellation was a foreseeable probability until the last minute"). Rather, as the courts below correctly observed, all that existed 60 days in advance of the abrupt cancellation of the A-12 program was the possibility—inherent in every such contract—that the Government might cancel the program at some future date for any number of reasons. Pet. App. at A27 ("cancellation is a possibility every time there is a cost overrun, . . . and experience teaches us that there are invariably overruns, which most often do not lead to contract cancellation"). WARN cannot require an employer to notify its employees of every mass layoff threat, no matter how remote. Pet. App. at A27 (characterizing such a standard as "impracticable"). Accordingly, the Court of Appeals interpreted the term "reasonably foreseeable" to include only those business circumstances that were likely—or "probable"—at the time notice would have otherwise been required. Since there was no evidence that the A-12's cancellation was even arguably "probable" prior to General Dynamics' issuance of WARN notices in

mid-December 1990, the unanimous Court of Appeals affirmed the District Court's dismissal of Petitioners' claim.[1]

Dissatisfied with the result reached before the District Court and affirmed by the Court of Appeals, Petitioners would have this Court revisit their claims in the context of certiorari. In an effort to justify this review, they phrase their request in terms of "Constitutional rights" and "circuit splits." But while Petitioners parrot various grounds for granting certiorari, they fail to explain why the decisions below even arguably merit this Court's review. The violation of Constitutional rights Petitioners allege is nothing more than an exercise of sound discretion by the District Court, which the Court of Appeals left undisturbed. Petitioners can hardly turn their own failure to take discovery in a timely manner into a Constitutional issue worthy of this Court's attention. Similarly, the conflict Petitioners allege to exist between the Court of Appeals' application of WARN and decisions from other courts is illusory. Indeed, one of the cases Petitioners rely on to demonstrate the alleged conflict among the circuits actually reaches the same result on claims arising from the same facts as here. *Loehrer*, 98 F.3d at 1062 ("we think that the Government's cancellation of the A-12 contract was not reasonably foreseeable . . . prior to January 7, 1991"). Thus, Petitioners seek this Court's review without any basis.

REASONS FOR DENYING THE WRIT

The Petition raises no issue appropriate for this Court's review. Petitioners suggest that the District Court's refusal to stay General Dynamics' summary judgment motion violated

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[1] Thorough statements of the facts and procedural history of this case are set forth in the decisions of the courts below. Pet. App. A2-A3, A5-A9, A19-A23, A27-A29. Additional detailed descriptions of the A-12 program's history and the events leading to its cancellation are reported at *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056, 1057-60 (8th Cir. 1996); *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 361-68 (1996); and *International Ass'n of Machinists v. General Dynamics Corp.*, 821 F. Supp. 1306, 1307-11 (E.D. Mo. 1993).

their Constitutional rights and this Court's summary judgment standards. Yet this suggestion does not explain Petitioners' failure to pursue discovery prior to the District Court's ruling or excuse their inability to demonstrate how any such discovery might have changed the outcome of their case. Accordingly, Petitioners' argument amounts to nothing more than an attempt to involve this Court in evidentiary and scheduling matters resolved in the sound discretion of the District Court and left undisturbed by the Court of Appeals. Similarly, Petitioners suggest that the unanimous decision of the Court of Appeals conflicts with WARN and the decisions of other circuits applying the statute's "business circumstances" exception. Yet Petitioners have not identified any conflict warranting this Court's review. Indeed, one of the decisions with which Petitioners suggest the Court of Appeals is in conflict reached the same result as the courts below on virtually identical facts. Accordingly, Petitioners have offered no grounds on which the writ they seek would be appropriate.

I. Petitioners' Failure to Seek Discovery Does Not Raise Constitutional or Other Issues Warranting This Court's Review.

Petitioners suggest that, by refusing to postpone consideration of General Dynamics' motion for summary judgment, the District Court violated Petitioners' Constitutional rights and this Court's summary judgment standards. Petitioners' Brief ("Brief") at 14-19. Despite these characterizations, the heart of Petitioners' argument is the assertion that they were allowed an inadequate opportunity to conduct discovery. Except in the most extreme cases, however, dissatisfaction with a lower court's exercise of discretion on scheduling and discovery matters does not justify review by writ of certiorari. *See, e.g., Stack v. Boyle,* 342 U.S. 1, 13 (1951) ("this Court will not exercise its certiorari power in individual cases except where they are typical of a problem so important and general as to deserve the attention of the supervisory power") (Jackson, J., concurring).

Even if review by this Court were warranted, moreover, Petitioners could not overcome their own failure to seek the discovery they claim they were denied. In particular, a claim of inadequate opportunity for discovery overlooks the fact that, excluding the class certification process and time spent on appeal, Petitioners had a cumulative period of nearly six months in which to conduct discovery on their claims, yet they propounded no discovery request of any kind on General Dynamics during this time. Thus, as the District Court observed: "there is no merit to [Petitioners'] argument that they should be entitled to conduct discovery through the date set by the court's scheduling order for discovery cutoff before being required to respond to a motion for summary judgment." Pet. App. at A15 n.6.

Similarly, in leaving undisturbed the District Court's exercise of discretion in this regard, the Court of Appeals correctly noted: "[Petitioners] have not demonstrated to this Court that further discovery would lead to any evidence, which might raise the A-12 contract cancellation from a possibility to a probability any sooner than December 14, 1990." Pet. App. at A30. Thus, the Court of Appeals followed well-established precedent holding that Petitioners were obligated to show not only diligence in pursuing the discovery in question, but also specifically how the requested discovery would defeat summary judgment. *See, e.g., International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). In their Petition, as below, Petitioners fail to describe with any precision what evidence they expected to find in the neglected discovery that was different from that presented and ultimately rejected in each of the A-12-related cases that preceded this one. Pet. App. at A16 ("[Petitioners] do not specify, however, the facts they expect to prove by such depositions . . . [n]or do they explain what they hope to glean from the voluminous documents produced in prior litigation of WARN claims"). Accordingly, Petitioners have identified no basis on which this Court should review the sound discretion exercised by the District Court and left undisturbed by the unanimous panel of the Court of Appeals.

II. There is No Conflict Among the Circuits or Other Authorities Warranting This Court's Review.

Petitioners suggest that the Court of Appeals' application of WARN's "business circumstances" exception conflicts with the statute, its regulations, and the decisions of other courts. Brief at 19-27. Petitioners fail, however, to demonstrate the existence of any such conflict. Indeed, Petitioners point to the Eighth Circuit's decision in *Loehrer v. McDonnell Douglas Corp.*, 98 F.3d 1056 (8th Cir. 1996), as evidence of a purported circuit split. Yet in *Loehrer*, the Eighth Circuit reached precisely the same conclusion—on virtually identical facts involving General Dynamics' partner on the A-12 program—as did the Court of Appeals in the instant case. Thus, Petitioners cannot demonstrate that the conflict they perceive, even if it existed, would make a difference in this case.

In enacting WARN, Congress struck a balance between too little notice of mass layoffs (with employees needlessly deprived of an opportunity to prepare) and too much notice (with employees unnecessarily alarmed and the credibility of subsequent notices reduced). Accordingly, WARN requires notice of real and proximate layoffs, but does not sanction generalized or "rolling" notices that fail to provide concrete details about actual events. 20 C.F.R. §§ 639.7(b) & (d)(2) (requiring precision with respect to the timing of anticipated layoffs); 20 C.F.R. § 639.10(b) ("[r]olling notice, in the sense of routine, periodic notice, given whether or not a plant closing or mass layoff is impending . . . is not acceptable"). This policy balance is specifically reflected in WARN's "business circumstances" exception, which exempts employers from the general requirement of 60-days' notice before a mass layoff in the case of "business circumstances that were not reasonably foreseeable as of the time the notice would have been required." 29 U.S.C. § 2102(b)(1). As the Court of Appeals noted, however, this exception becomes unworkable—particularly in the context of Government defense contracting—if "reasonably foreseeable" is

read, as Petitioners suggest, to mean merely "possible" or "conceivable." Pet. App. at A27. Rather, what WARN requires is more sensible: that an employer share with affected employees as soon as practicable any special knowledge it has indicating imminent termination of the contract. Here, as the courts below found, General Dynamics provided individual notice to each of thousands of ultimately affected employees, updating them on relevant developments regarding the A-12 contract within days of learning of such developments from the Government. Pet. App. at A5-A9, A20-A21. Moreover, it did so without ever itself believing that the A-12 program would actually be canceled.

Thus, it is not surprising that every court to examine the circumstances of this case has concluded that General Dynamics complied with WARN. Pet. App. at A12-A13, A27-A29; *see also International Ass'n of Machinists*, 821 F. Supp. at 1313 ("cancellation of the A-12 contract . . . was not reasonably foreseeable" 60 days prior to the termination).[2] Moreover, although there may be cases in which nuances of the term "reasonably foreseeable" could be significant, this is not such a case. In construing the exception here, the Court of Appeals simply noted that, if the word "reasonably" is to retain any meaning, it must be to limit the class of "foreseeable" events to exclude those that are merely

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[2] Similarly, WARN litigation involving General Dynamics' partner on the A-12 program has reached the same conclusion. *See Loehrer*, 98 F.3d at 1062 (recognizing "unique, politically charged area of defense contracts," in concluding that "the Government's cancellation of A-12 contract was not reasonably foreseeable"); *Loehrer v. McDonnell Douglas Corp.*, No. 4-91 CV 01747, slip op. (E.D. Mo. Oct. 14, 1995) ("support for the A-12 was strong enough to find that [the contractors] had exercised reasonable business judgment in continuing to believe that termination would not occur"), *aff'd*, 98 F. 3d 1056 (8th Cir. 1996). Even in litigation between the Government and the contract team, courts have recognized the unexpected nature of the termination decision. *See McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 371-73 (1996) ("[n]either the Contracting Officer nor the Navy had planned to issue a cure notice; [rather] the timing was dictated by the show cause memorandum from Secretary Cheney").

remote possibilities,[3] thus rendering it "the probability of occurrence that makes a business circumstance 'reasonably foreseeable.' " Pet. App. at A27. Applying this reasonable interpretation to the facts of the A-12 program, the Court of Appeals recognized that the term "reasonably foreseeable" could not, as a practical matter, include the risk of contract cancellation inherent in any Government program:

> Since cancellation is a possibility every time there is a cost overrun, defense contractors like General Dynamics would be put to the needless task of notifying employees of possible contract cancellation and concomitant lay-offs every time there is a cost overrun, and experience teaches us that there are invariably cost overruns, which most often do not lead to contract cancellation.

Pet. App. at A27.

Although Petitioners suggest that WARN's regulations and the decisions of several other courts look to the employer's exercise of "commercially reasonable business judgment" in determining whether an event was "reasonably foreseeable," Brief at 22, they nowhere explain how this test is inconsistent with the Court of Appeals' approach or consistent with the alternative standard they advocate. To the contrary, the requirement that an employer use "commercially reasonable business judgment . . . in predicting the demands of [the] particular market," 20 C.F.R. § 639.9(b)(1)-(2), implicitly recognizes that not every conceivable turn of events should trigger notice under WARN, but rather only

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[3] This requirement that the event in question be probable, and not merely a possibility, is consistent with application of the "reasonably foreseeable" standard in tort law generally. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943) (in the context of a negligence claim, a "[b]are possibility is not sufficient" to impose a duty to guard against injury); *see also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 553 n.12 (1994) (noting that where term "reasonably foreseeable" is expanded to encompass all possible results of an event, the qualifying word "reasonably" loses any purpose).

those events that the employer "predicts" (or should have predicted) as likely in its exercise of commercially reasonable business judgment.[4] Accordingly, whether characterized in terms of "probability" (as by the Court of Appeals) or in terms of "predict[ions]" based on "commercially reasonable business judgment" (as in decisions citing the regulations), lower courts have been consistent in recognizing that not every possibility of contract termination gives rise to a notice obligation under WARN.

Finally, Petitioners suggest that the Court of Appeals' approach impermissibly "modifies the plain meaning of the statute" by "shift[ing] the burden of proof to the Petitioners." Brief at 24. Contrary to this assertion, however, the opinion does not address, much less alter, the parties' respective burdens. Rather, it simply affirms that, on the facts of this particular case, "no rational jury could have concluded that contract cancellation was a foreseeable probability until the last minute, *i.e.*, December 14, 1990." Pet. App. at A29. Thus, Petitioners' real dissatisfaction is not with the allocation of burdens, but rather with the lower courts' findings that the evidence is simply insufficient to support a judgment in Petitioners' favor. That fact-bound application of settled law to the evidence of record in this case does not warrant this Court's review. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

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[4] *See, e.g., Local Union 7107 v. Clinchfield Coal Co.*, 124 F.3d 639, 641 (4th Cir. 1997) ("a reviewing court must be careful to avoid analysis by hindsight; the trail of harbingers of an unforeseen event always looks brighter in retrospect"), *cert. denied*, 118 S. Ct. 1189 (1998); *Loehrer*, 98 F.3d at 1061 (8th Cir. 1996) (noting, in context of A-12 cancellation, that "[the WARN] Act and its regulations necessarily recognize that even the most conscientious employers are not perfect, and they thus allow needed flexibility for predictions about ultimate consequences that, though objectively reasonable, proved wrong"); *Jurcev v. Central Community Hospital*, 7 F.3d 618, 626 (7th Cir. 1993) (defendant's mere "awareness of these circumstances [leading to cessation of subventions] did not render the . . . decision to stop making subventions reasonably foreseeable"), *cert. denied*, 114 S. Ct. 1830 (1994).

III. This Case Raises No Issue of Broad Application Warranting this Court's Review.

Petitioners assert that WARN has "broad effect . . . concerning the reductions in force occurring on a daily basis in our society." Brief at 30. Even if this generalization were true, however, it would have little significance in this case. The decisions below turn exclusively on a narrow exception to WARN that has resulted in fewer than 20 reported federal decisions at any level in the ten years it has existed and as to which there is no meaningful disagreement among the lower courts. Moreover, this case arises in the still narrower context of Government contracting, and specifically from the unique facts of the A-12 program. Under such narrow circumstances, review could hardly be said to settle "an important question of federal law." Supreme Court Rule 10.

CONCLUSION

For the foregoing reasons, Respondent General Dynamics respectfully requests that the Petition for Writ of Certiorari be denied.

DATED: August 10, 1998

Respectfully submitted,

William J. Kilberg

GIBSON, DUNN &
CRUTCHER LLP
WILLIAM J. KILBERG
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

KARL G. NELSON
1717 Main Street, Suite 5400
Dallas, Texas 75201-7390
Telephone: (214) 698-3100
Facsimile: (214) 698-3400
ATTORNEYS FOR RESPONDENT, GENERAL DYNAMICS CORPORATION